United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1124

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES, ex rel. ALEJANDRO DANEFF,

Petitioner-Appellant,

- against -

No. 74-1124

ROBERT HENDERSON, Superintendant,
Auburn Correctional Facility,
Auburn, New York,

Respondent,

REPLY BRIEF FOR RELATOR-APPELLANT

ABRAHAM WERFEL, Esq.
Attorney for Petitioner-Appellant
Office & P.O. Address
160-16 Jamaica Avenue
Jamaica, New York 11432
297-2222

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
SECOND CIRSUIT

UNITED STATES, ex rel. ALEJANDRO DANEFF,

Petitioner-Appellant,

- against - No. 74-1124

ROBERT HENDERSON, Superintendant,
Auburn Correctional Facility
Auburn, New York,

Respondent.

REPLY BRIEF FOR RELATOR-APPELLANT

POINT ONE

A GUILTY PLEA DOES NOT WAIVE AN OBJECTION TO THE CONSTITUTIONALITY OF A STATE STATUTE, SINCE THE DEFECT GOES TO THE JURISDICTION OF THE COURT. (Answering Respondent's Point I).

Appellant's guilty plea, after raising the constitutional question in the State Court by demurrer to the indictment and a motion for arrest of judgment, does not waive the objection to the constitutionality of the statute.

A direct challenge to the jurisdiction of the court is implicit in the assertion of the unconstitutionality of the penal statute (Criminal Procedure in New York, Paperno & Goldstein, 1960, Sec. 380). Such a challenge under New York law is properly brought by demurrer or by motion in arrest of judgment (People v. Reed, 276 N.Y. 5; People v. Estreich, 272 App. Div. 698).

Objections to the jurisdiction of the court are not waived by a plea of guilty (People v. Scott, 2 N.Y. 2d 148, 152).

The voluntary admissions made by appellant upon entering the plea was nothing more than a plea of guilty to a statute which he alleged was unconstitutional, upon which ground he reserved his right to appeal. The order, being one of an intermediate nature, is not appealable under New York law until final judgment is entered (People v. Flaherty, 206 App. Div. 736; People v. Siegel, 282 App. Div. 747).

The authorities cited by respondent are not truly to the contrary. Here appellant did not bypass state procedures (cf. Fay v. Noia, 372 U.S. 391). Only non-jurisdictional defects were held waived in U.S. ex rel. Glenn v. Mc Mann, 349 F. 2d 1018 (2d Cir. 1965). In Mc Mann v. Richardson, 397 U.S. 759, the court was discussing the admissibility of evidence (confession) and held that the plea is a waiver of trial "and unless the applicable law otherwise provides, a waiver of the right to contest the admissibility of any evidence..." (at page 766, emphasis added). As heretofore stated, applicable law of New York provides that a plea of guilty does not waive objections to the constitutionality of a statute, especially if properly raised by demurrer or arrest of judgment.

POINT TWO

DANEFF'S ALLEGATIONS ARE BASED UPON THE CLEAR AND UNAMBIGUOUS WORDING OF THE STATUTES AND FACTUAL EVIDENCE, NOT UPON SPECULATION. HE HAS THE STANDING TO PRESENT THEM.
(Answering Respondent's Point II).

Grasping at any straw in an attempt to forestall this court reaching the true issue before it, respondent contends that Daneff has no standing because, by his guilty plea, he "eliminated the need for such (quantitative) analysis... having obviated the need for a pretrial analysis of his mixture by pleading guilty" (Respondent's memorandum of law, p. 13). It is appreciated that the Attorney General's Office is not normally concerned with the trial of narcotic cases and has little contact with the evidence in possession of the police, as contrasted to the District Attorney. The record in the State Court contains the concession by the District Attorney that the only evidence possessed from the laboratory report was that "cocaine present. That's the way the statute reads." (Sentence minutes, p. 10, emphasis added).

The District Attorney was only repeating the arguments made during the argument on the demurrer and for arrest of judgment, that the statute is clear and unambiguous and obviates the need for a quantitative analysis. The state courts are bound to follow the clear wording of the statute (Melter v. Koenigsberg, 302 N.Y. 523, 525), and therefore the police do not conduct a quantitative analysis.

Prior to 1967, the former Penal Law Section 1751 required a quantitative analysis, because it provided that the mixture must contain at least one percent of the narcotic substance. This requirement was eliminated in enacting Section 220.15 of the Revised Penal Law, and therefore, no quantitative analysis is performed irrespective of the defendant's plea (See Practice Commentary by Richard G. Denzer and Peter Mc Quillan, Mc Kinney's Consolidated Laws of New York (Sec. 220.15).

It is interesting to note that in People v. Earl Martin, Supreme Court, Queens County, Indictment No. 2202/73, where defense counsel moved to dismiss the indictment on the ground that a quantitative analysis of the evidence was not performed, Justice Francis X. Smith states as follows, in denying the motion:

> "This argument has been rejected by the Court of Appeals (People v. Daneff, citation). Without inspecting the Grand Jury minutes, the Court will grant that the type of quantitative analysis urged by defendant was not performed. Daneff (supra) lays to rest the need for such a test."

Two additional comments are appropriate. Since the quantitative analysis was not presented to the grand jury, it would be immaterial that such an analysis could have been made if the case went to trial. Furthermore, if there is any factual issue as to the narcotic content of the evidence, it was incumbent upon the District Court to hold a hearing (Machibroda v. U.S. 368 US 487, 495). Upon such a hearing, the burden of proof to prove defendant's guilt would be upon the People, as noted in our main

brief. We are not involved here with a defendant who alleges an exception to the statute, under which the burden falls upon the defendant (Cf. Tillman v. U.S. 268 F. 2d 422). We must reiterate; under the state statute the possession of any quantity of heroin is a misdemeanor. The burden is upon the People to demonstrate that Daneff falls under an exception to that statute, providing for felony punishment.

POINT THREE

THE CHALLENGED STATUTORY PROVISIONS HAVE NO RATIONAL BASIS IN LAW AND FACT. (Answering Respondent's Point III).

Respondent cites and quotes the Governor's memorandum, in support of its position (Respondent's memorandum, p. 15). The quotation clearly states to "distinguish between scale sellers... and large scale sellers" (Emphasis added). The issue before this court does not involve sellers of narcotics. New York statutes, contrasted to other jurisdictions, distinguish between the scale of narcotics and the possession of narcotics. They are entirely different statutes. As stated in our main brief, for the purpose of this proceeding we are not concerned with statutes proscribing the sale or transfer of narcotics.

Furthermore, respondent misconstrues our argument when it alleges that we are concentrating on the "situation where the seized narcotic mixture contains only an infinitesimal degree of pure narcotics" (Respondent's memorandum, p. 17). We have used these examples only to dramatize the shocking impact of the law as

written. We have attempted to make it clear that the argument presented applies to one who also possesses a quantity of pure heroin in an amount just under 1/8 oz., or just under 1 oz., or just under 8 oz., or just under 16 oz. Each of these possessors will be treated more harshly than another similarly situated, if the pure heroin he possesses is comingled with a small amount of inert diluent. In each of these cases, the possession of the additional small amount of diluent makes him subject to the higher felony statute. True, it is more shocking when the defendant possesses 55 grains of pure heroin and is treated as a misdemeanant, or as little as a trace whereas his counterpart possesses 55 grains of pure heroin in a mixture of milk sugar totalling 16 ounces, and is treated as a Class A felony. But the legal principle is the same in both cases.

Respondent cites this court's holding in United States v. Haynes, 398 F. 2d 980, as supporting the contention that a quantitative analysis is not required as a valid basis for conviction. However, this applies to the Federal Statute which does not provide for different culpability and punishment based upon the quantity of contraband possessed.

Surprisingly, respondent characterizes punishment for a Class C felony for possession of two bottles of methadone, as "trivial" (Respondent's memorandum, p. 18). Since the defendant Giles could have been charged with a Class A I Felony (Section 220.21 of the Revised Penal Law) mandating a life sentence, one

can possibly consider the Class C felony charge as trivial. But the issue still remains that a defendant possessing the same quantity of methadone in pill or wafer form would only be guilty of a misdemeanor. Moreover, we are informed that the District Attorney of Queens County is considering indicting similar possessors of methadone mixture as Class A felonies. In any event, as set forth in our main brief, the statute cannot be saved by the possibility of considerate enforcement (See citations, footnote 5, p. 14 appellant's main brief). The examples we have submitted in our main brief can be truly considered "a parade of horror cases." But in fact, as set forth above, each and every case of possession of narcotics as a felony is a horror case, because the felony is based upon the weight of the innocuous diluent (excepting, of course, those comparatively few cases where the felony is based upon possession with the intent to sell).

POINT FOUR

APPELLANT"S SENTENCE, BEING BASED UPON THE POSSESSION OF INERT, INNOCUOUS DILUENT IS CRUEL AND UNUSUAL PUNISHMENT.
(Answering Respondent's Point IV)

Contrary to respondent's contention, appellant's Eighth Amendment claim is not based upon an assertion that the possession of eighteen ounces of narcotic mixture could have subjected him to life imprisonment. It is primarily based upon the fact that his ten year sentence, rather than a one year sentence, is based

upon his possession of a diluent making the aggregate weight of the mixture in excess of 1/8 oz. We are not quibbling about the state court judge's reasonable exercise of sentencing power. If the statute were constitutional, we have agreed that there is no abuse of discretion. The issue remains that the Legislature has decreed that the possession of any quantity of narcotics is punishable with a maximum of one year imprisonment. Daneff had been sentenced to nine additional years for the possession of inert diluents. Such punishment is cruel and inhuman and violative of the Eighth Amendment; and a statute that premits such punishment is constitutionally defective.

CONCLUSION

THE PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE GRANTED.

Respectfully submitted,

ABRAHAM WERFEL, ESQ.,
Attorney for Petitioner-Appellant
Office & P.O. Address
160-16 Jamaica Avenue
Jamaica, New York 11432
297- 2222

Dated: Jamaica, New York
May 6th, 1974

74-1124

Affidavit of Service by Mail

State of New York)
County of Queens) ss:-

ANDREA ANDRECHENKO, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Queens Village, New York. That on the 7 day of May, 1974, deponent served the within Reply Brief for Relator-Appellant, upon Attorney General, attorney for Respondent in this action, at 2 World Trade Center, New York, New York, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office- official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this 7 day of May, 1974.

Andrea Andrechenko

Abraham Werfel

ABRAHAM WERFEL
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-9516150
Qualified in Queens County
Commission Expires March 30, 1976